IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 89

KNUT EINAR HEIKKINEN, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a judgment of the United States District Court for the Western District of Wisconsin convicting petitioner of violating Section 20(c) of the Immigration Act of 1917, as amended, 64 Stat. 1010 (1950).

OPINION BELOW

The opinion of the court below has not yet been reported. It is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1957 (Appendix, *infra*), and a petition for rehearing was denied on February 4, 1957. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "self-deportation" statute (section 20(c) of the Immigration Act of 1917, added by section 23 of the Internal Security Act of 1950, 64 Stat. 1010), is unconstitutional on its face or as applied in this case.

2. Whether the crime of willful failure to depart may be committed before travel documents have been obtained by reason of a failure to apply for travel documents.

3. Whether the trial court's instructions erroneously eliminated the necessity for proof of willfulness and criminal intent.

4. Whether the statute applies to persons ordered deported under the provisions added to the Immigration Act of October 16, 1918 by the Internal Security Act of 1950.

5. Whether the petitioner was convicted under an erroneous construction and application of the statute.

6. Whether the conviction is supported by the evidence.

7. Whether the petitioner was properly convicted, when the sole evidence against him consisted of an uncorroborated confession.

8. Whether the trial court abused his discretion in refusing to suspend sentence in accordance with the provisions and standards laid down in the statute.

STATUTES INVOLVED

Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, amended the Immigration Act of February 5, 1917 to add section 20(c), as follows:

> "Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909 as amended (35 Stat. 614, 42 Stat. 596; 21 U.S.C. 171, 174-175); the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U.S.C. 156a; or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers, or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: Provided, That this subsection shall not make it illegal for any

alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: Provided further, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws."[1]

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008 amended section 1 of the Immigration Act of October 16, 1918, to provide in part as follows:

> "That any alien who is a member of any one of the following classes shall be excluded from admission into the United States.
>
> * * * *

[1] The statute, with some revisions, was carried forward in section 242(c) of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1252(c).

"(2) Aliens who, at any time, shall be or shall have been members of the following classes:

* * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt . . ."

The aforesaid Section 22 amended Section 4 of the Immigration Act of October 16, 1918, to provide in part:

"(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."[2]

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[2] These provisions were repealed by Section 403 (a)(16) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 279. The 1952 Act recodified and reenacted those provisions without material change. See Section 241(a)(6)(C), 66 Stat. 204, 8 U. S. C. 1251(a)(6)(C).

STATEMENT OF THE CASE

The petitioner was convicted on both counts of a two-count indictment (R. 179-181). The indictment alleged that he had been ordered deported on April 9, 1952, on the ground of membership in the Communist Party after entry. The first count charged him with willfully failing to depart from the United States during the six months period beginning April 9, 1952. The second count charged that during that same period the petitioner "did willfully fail to make timely application in good faith for travel or other documents necessary to his departure from the United States." (R. 1-2).

The petitioner is an alien, a native of Finland, who was first admitted into the United States for permanent residence in 1916, and whose last entry into the United States was in 1935. He has resided in the United States since that date.[3] After several proceedings before the Immigration and Naturalization Service, the Board of Immigration Appeals on April 9, 1952, affirmed an order of deportation against the petitioner on a finding that he had been a member of the Communist Party from about 1922 to 1930,[4] and

[3] See pp. 7-17 of the transcript of a hearing on a petition for habeas corpus in the United States District Court for the District of Minnesota Fifth Division, November 10, 1950, introduced as Exhibit 11 of the deportation hearing which was introduced as Exhibit 1 at the trial.

[4] The opinion below states that the petitioner was a member of the Communist Party in 1932, 1947, and 1948 (App. 2a). There was evidence to that effect in the deportation hearing, but the Board of Immigration Appeals, which is the final adjudicating body in the Service, limited its findings of Communist Party membership to the period 1922 to 1930.

was therefore deportable under the Internal Security Act of 1950, amending the Immigration Act of October 16, 1918 (see decision of Board of Immigration Appeals, Exhibit No. 1).[5]

On or about April 18, 1952, Mr. Maki, a representative of the Service called upon petitioner and interviewed him for the purpose of filling out a Service form headed "Passport Data for Alien Deportees" (Exhibit 9, R. 127). This was the form utilized by the Service to obtain the personal history of a deportee ~~in order to enable the Service to obtain the personal history of a deportee~~ in order to enable the Service to procure, in accordance with its usual practice, the necessary travel documents for the alien (R. 82, 89, 128, 132, 138-41). Petitioner was told by Maki that the information was required for the purpose of "somebody in the Government possibly obtaining travel documents for him" (R. 138, 144-5). The petitioner fully cooperated and gave all the necessary information (R. 137). The form was duly forwarded to the Chicago office of the Service for processing (R. 89, 102, 127, 128, 138). The trial court ruled out all efforts of petitioner to learn what was done with this form or what steps were taken by the government to obtain travel documents for the deportation of the petitioner (R. 19-21), on the ground that the government owed the petitioner "no duty" (R. 19).

On April 30, 1952, the Officer-In-Charge of the Duluth, Minnesota, office of the Service wrote to the

[5] The order of deportation was also based upon a finding that the petitioner had last entered the United States without a valid immigration visa. This ground is not involved here since it is not one of the grounds for deportation to which the criminal statute applies.

petitioner on a mimeographed form as follows (emphasis added):

"Dear Sir:

"An order, of which you have been notified, directing your deportation from the United States was entered on April 25, 1952,[6] on the following grounds:

"'The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and

"'The Act of October 16, 1918, as amended, in that he was, after entry, a member of the following class set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.'

"*Arrangements to effect your deportation pursuant to such order are being made and when completed, you will be notified when and where to present yourself for deportation.*

"In this connection you are reminded that Section 23 of the Internal Security Act of 1950, which was enacted by Congress on September 23, 1950, declares that any such alien 'who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of' that Act 'whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to

[6] This was the date on the formal warrant for deportation. The actual date of the order for deportation was April 9, 1952, the date of the decision by the Board of Immigration Appeals (R. 112).

prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony. Provided, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: * * *'

"Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950." (Exhibit 6, R. 74-75.)

On February 12, 1953, petitioner was interviewed by officials of the Service and gave them a sworn statement. This statement (Exhibit 8) was the sole evidence introduced by the government to show that petitioner had failed to depart or make timely application for travel documents.

In this statement, petitioner said that he had informed his attorney of the visit from Mr. Maki and of his understanding as a result of that interview "that whenever I have to personally start to do something to get a passport I will be officially informed."; and that his attorney replied that petitioner should wait "until you get official information from the immigration authorities." (R. 102-3). The statement continued as follows (R. 103-105):

Q. Since receipt of the letter on Form I-229 dated April 30, 1952, did you depart from the United States in the required six months period thereafter?

A. No.

Q. Have you departed from the United States at any time since April 30, 1952?

A. No, I have just been waiting for instructions from the immigration authorities.

Q. But you had already been given appropriate instructions in writing in the letter of April 30, 1952. What made you believe you would get any other instructions relative to your departure from the United States?

A. The discussion with Mr. Maki at our office gave me the impression that he will write to the officials in Canada and Finland and in case he will not succeed, then he will inform that I will have to do it myself.

Q. Didn't Mr. Maki of the Duluth immigration office merely interview you at that time to execute an immigration form with which the Immigration and Naturalization Service was proceeding independently of any efforts of yourself, to deport you from the United States?

A. No, this was not the understanding. Mr. Maki told me at first he will write to Canada and find out whether they will accept me because my last citizenship was Canadian. Mr. Maki stated that apparently it would take about two months to get the official answer from there. Then he stated he has start to a correspondence with the Consul General of Finland in New York and if he does not succeed to get an affirmative answer then it will befall upon me to apply personally, to make an application for a visa to Finland. That was the essence—we had a lengthy discussion.

Q. Did not Mr. Maki call your attention at the time of that interview with you, that you would have to proceed independently and simultaneously to apply for a passport with which to leave the

United States within the six months period of time commencing April 25, 1952?

A. At least I did not understand so.

Q. At your deportation hearing, what country did you specify to which you should be deported if you were ordered deported from the United States?

A. To my native country, Finland.

Q. During the six months period commencing April 25, 1952, did you make any effort to obtain a passport or other travel document with which to enter Finland or any other country?

A. No because I was waiting for word from the immigration office.

Q. Have you made any effort to secure a passport or other travel document with which to depart from the United States at any time since April 30, 1952?

A. No, because of the reasons that I have stated.

Q. Since the order of deportation was entered against you on April 25, 1952, did you receive any request from the Immigration and Naturalization Service to execute any passport application other than the interview with Mr. Maki of this office some time last summer when he apparently merely filled out an immigration form with which to present your case for issuance of travel documents to enter either Canada or Finland?

A. No, and in fact I have been wondering about that myself.

Q. Did you wilfully refuse to depart from the United States within the six months period commencing on April 25, 1952, as required by the law?

A. No.

Q. Did you wilfully fail to depart from the United States within the six months period commencing on April 25, 1952, as was required of you by law?

A. By no means, no.

Q. Did you wilfully refuse to apply in good faith during the required period of time in your

case, for a passport or other travel document which your could depart from the United States by October 25, 1952?

A. No.

Q. Why did you fail to make timely application for a passport and to depart from the United States by October 25, 1952 as required by law in your case?

A. Just because I was waiting for instructions from Mr. Maki as to when I should start to make application for a passport. In case the Service had failed to get a visa or passport.

The petitioner further stated that he wanted to cooperate with the Attorney General to secure a passport for Finland, but that if the Attorney General wished him to depart to some other country, he would wish to consult with his attorney before stating his position (R. 105).

A prior conviction of the petitioner upon the same indictment had been reversed by the Seventh Circuit on the ground that the trial court had not considered the validity of the underlying deportation order. *United States* v. *Heikkinen*, 221 F. 2d 890. Upon the retrial, the record of the deportation hearings were introduced into evidence (Exh. 1). The trial judge reviewed that record and held that the evidence therein supported the findings of the immigration officials and that the deportation order was valid (R. 47). He ruled that the validity of the order should not be submitted to the jury (R. 56-64), and he instructed the jury that the deportation order had been validly entered after a hearing in which the petitioner had been accorded due process of law (R. 166-167).

The trial court rejected the following instructions requested by the petitioner: (1) "The mere presence

in this country of an alien is not evidence of guilt" (R. 157), and (2) "The mere failure to depart from this country within six months, or to make timely application for travel document, is not a violation of the law. There must be a wilful failure and refusal to depart within six months or to make timely application for travel document." (R. 158).

He instructed the jury as follows as to the interpretation and meaning of the statute (R. 166-8):

> "The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent.
>
> * * * * * * *
>
> "You are instructed that the statute on which this indictment is laid . . . places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's willful failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged.
>
> "'Willful' as used in this statute, means an intentional failure and refusal to comply with the order of deportation.
>
> "There is no duty on the part of the Government to assist the defendant in effecting his departure. The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.
>
> "As I say, the material parts of the statute I have read to you place upon an alien against whom

> an order of deportation is outstanding, an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case.

The petitioner was convicted on both counts. He was sentenced to a five year prison term on the first count. Imposition of the sentence on the second count was deferred by the trial judge "until I determine whether or not he has made an honest application and an effort to leave this country and to comply with that order" (R. 175).

REASONS FOR GRANTING THE WRIT

This is the first conviction under the "self-deportation" statute, first enacted by the Internal Security Act of 1950 and carried forward into the current Immigration and Nationality Act. It raises major and novel questions regarding the constitutionality and application of the act which have, we believe, been erroneously decided below.

1. Constitutionality

United States v. *Spector*, 343 U.S. 169, recognizes the substantial nature of the question as to constitutionality of the statute on its face. There was no conviction in *Spector*, the case coming to this Court on appeal from a District Court order dismissing an indictment under the statute. *Spector* did not involve the clause on which petitioner was sentenced (willful failure to depart), but involved only the clause (will-

ful failure to apply for travel documents) on which petitioner was convicted but sentence was deferred. In *Spector*, a divided Court held solely that the latter clause was not invalid for vagueness. The majority opinion refused to consider whether the statute was unconstitutional for reasons other than vagueness, since such reasons had not been raised or briefed, and it preferred to defer passing on them "until a stage has been reached where the decision of the precise constitutional issue is necessary" (at 172). The majority added (at 172): "It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court or by the jury . . . when and if the appellee seeks to have it tried. That question is not foreclosed by this opinion. We reserve decision on it."

Justices Black, Frankfurter and Jackson dissented. Justices Frankfurter and Jackson did so in an opinion written by the latter on the ground, not reached by the majority, that the statute was invalid on its face because it denied an accused trial by jury and other constitutional safeguards by removing from determination in the criminal proceeding an issue indispensable to guilt, namely, whether the accused was in fact deportable.[7] Justice Jackson's opinion pointed out (at 178-9):

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[7] Justice Jackson's opinion points out (at 178-9) that the statute deprives the accused of the following safeguards with regard to the issue of whether he is deportable: trial by jury, requirement of proof beyond a reasonable doubt, statute of limitations. To these may be added: the benefits of the ex post facto and bill of attainder clauses, the rule prohibiting conviction on uncorroborated confessions (see *infra*, p. 22), the judicial rules of evidence, such as the hearsay rule, *U. S. ex rel Bilokumsky* v. *Tod*, 263 U. S. 149; *U. S. ex rel Tisi* v. *Tod*, 264 U. S. 133; *U. S. ex rel Vajtauer* v. *Commis-*

> "Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. . . . . By this Act a deportation order is made to carry potential criminal consequences."

Justice Black dissented on the ground that the statute was unconstitutionally vague, but he added: "I have not yet seen a satisfactory reason for rejecting [Justice Jackson's] view" (at 174, ftn. 2).

In this case the constitutional questions which both the majority and minority considered serious in *Spector* are obviously ripe for review by this Court. There has been a conviction under the statute. The court below passed on, and disagreed with, the constitutional objections set out in Justice Jackson's opinion. The "stage has been reached where the decision of the precise constitutional issue is necessary."[7]

The doubt as to the validity of the statute is magnified because of the specific ground of deportability involved. The statute does not apply to all deportees, but only to those ordered deported for certain causes. Thus a necessary element of the crime is the cause for deportation. In petitioner's case, this cause was his alleged past membership in the Communist Party as provided in the Internal Security Act of 1950.[8] This

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sioner, 273 U. S. 103; the principle that failure to testify is not evidence of guilt *U. S. ex rel Bilokumsky* v. *Tod*, *supra*; *U. S. ex rel Vajtauer* v. *Commissioner*, *supra*, and the right under Rule 44 of the Federal Rules of Criminal Procedure to have counsel assigned. Petitioner was not represented by counsel in the deportation hearing.

[8] See *infra* p. 18, for our discussion of the question as to whether the statute covers this ground for deportation.

statute was sustained against objections of lack of due process and violation of the ex post facto and bill of attainder clauses, on the ground that deportation is not a criminal proceeding and does not inflict punishment. *Galvan* v. *Press*, 347 U.S. 522; cf. *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Yet here an administrative decision of deportability made under that statute has resulted in punishment by a five-year prison sentence, with another sentence in the offing.

Furthermore, at this writing, this Court is reconsidering the constitutionality of the Communist-deportation statute and is determining whether *Galvan* should be overruled. *Rowoldt* v. *Perfetto*, No. 34 this Term.

2. Relationship of the Two Offenses

The statute penalizes both a willful failure to depart and a willful failure to make timely application for travel documents. Congress obviously meant these to be separate offenses to cover different contingencies. The failure-to-depart crime can be committed only after travel documents have been obtained, whether by the alien or the Service. A failure to apply for travel documents can not by itself constitute a failure to depart.

Here, however, the two statutory crimes were made identical. The record is clear that travel documents had not been obtained. The petitioner, therefore, could not have committed the crime of failure to depart, alleged in the first count. Yet he was convicted on that count.[9] Furthermore, the trial court's in-

[9] Since the petitioner was sentenced only on the first count, and not on the second (R. 175), a reversal of the conviction on the first count requires a reversal of the judgment below.

structions to the jury made the two crimes the same. He told the jury that the statute "places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's willful failure in that regard to fullfil such duty and obligation that is the gist of the offenses here charged" (R. 167-8). This permitted the jury to find a willful failure to depart solely from the failure to apply for travel documents. The trial court thus erroneously applied the statute so as to multiply penalties for one action (cf. *Prince* v. *United States*, decided Feb. 25, 1957, 25 U. S. Law Week 4182).

Certiorari should be granted, therefore, so that this Court can establish whether the two offenses created by the statute are one for the purposes of proof but two for the purposes of punishment, and whether the offense of willful failure to depart can be committed before receipt of travel documents.

3. Applicability of Statute

Petitioner was ordered deported under provisions added to the Immigration Act of October 16, 1918, by section 22 of the Internial Security Act of 1950, 64 Stat. 1010. The statute under which he was convicted is applicable to, "Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137). . . ." Prior to the amendment by 64 Stat. 1010, neither the original Act of October 16, 1918 nor the cited amendments, pro-

vided for deportation for membership in the Communist Party. An important and novel question is raised whether the statute applies to an alien against whom an order of deportation was entered for a cause provided by an amendment other than those listed in the statute.

4. Willfulness and Intent

The trial court instructed the jury: "'Willful,' as used in this statute, means an intentional failure and refusal to comply with the order of deportation" (R. 168). "The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent" (R. 166). A deportee has "an affirmative duty or obligation" to "take specific steps toward effecting his own departure . . . . he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case." (R. 168).

In combination, these instructions directed the jury to convict petitioner on a finding of nothing more than inaction, and without the need of either willfulness or intent. Congress, however, meant "willful" to be a meaningful and substantial element of the crime. The bill as originally reported to the Senate did not include the element of willfulness, and this omission was rectified by the Senate Judiciary Committee before presenting the bill in the form in which it was enacted. The Committee stated (Sen. Rep. 2369, 81st Cong., 2d Sess., to accompany S. 4037, at pp. 14-15):

> "As previously reported to the Senate by the Committee on the Judiciary, H. R. 10 makes it a

> felony for any alien in the subversive, criminal or immoral classes against whom an order of deportation has been entered to remain in the United States after 6 months from the date of entry of such order of deportation. Section 23 of the bill modifies this penalty by including an element of willfulness."

Furthermore, the trial court's definition of "willful" is contrary to the holdings of this Court that the term in a criminal statute requires a bad purpose and a specific intent to violate the statute. *Felton* v. *United States*, 96 U.S. 699; *Spurr* v. *United States*, 174 U.S. 728; *United States* v. *Murdock*, 290 U.S. 389; *Spies* v. *United States*, 317 U.S. 492; *Screws* v. *United States*, 325 U.S. 91; *Hartzel* v. *United States*, 322 U.S. 680. Even if the statute had not contained the word "willful," the trial court's instructions would have been incorrect as permitting conviction without a finding of actual criminal intent. *Morissette* v. *United States*, 342 U.S. 246.

The erroneous instructions were particularly prejudicial because of the absence of evidence of willfulness on the part of petitioner. In fact, the trial court should have entered a judgment of acquittal because mens rea was not proved. *Hartzel* v. *United States*, *supra*. The petitioner, it is true, did not apply for travel documents. But, according to his testimony, he did not do so because he understood that the Immigration Service was procuring the documents for him, as indeed is its usual practice. His testimony had solid corroboration in the facts that (1) an officer of the Service had interviewed him and obtained from him the information for a Service form designed for the Service's procurement of travel documents, and

(2) the notice of deportation sent to him by the Service recited: "Arrangements to effect your deportation pursuant to such order are being made and when completed you will be notified when and where to present yourself for deportation."

The trial court's instructions (especially when coupled with the admonition to the jury (R. 168) that, "There is no duty on the part of the Government to assist the defendant in effecting his departure") made this evidence meaningless, even though it was obviously crucial to willfulness and intent. Furthermore, there was no possible justification for the trial court's refusal to permit petitioner to ascertain what the Service had done with the form for obtaining passports and what steps it had taken to procure travel documents. For all that appears, the Service may have discovered that travel documents could not be obtained, in which event the prosecution of petitioner for failing to take a useless action would indeed be shameful and offensive to due process. The situation would be even worse if the Service had in fact obtained the necessary travel documents, but was withholding them from petitioner in order to make a prosecution.

Certiorari should be granted so that the Court may decide whether willfulness has any real meaning in the statute, whether a specific intent is required, whether it is permissible to pounce upon an alien because he has been lulled into inaction by the Service's informing him that it is making arrangements for his deportation, and whether an alien may be convicted for not applying for travel documents which are not obtainable or have already been obtained by the Service.

5. Conviction on an Uncorroborated "Confession"

The sole evidence to support the conviction was petitioner's written statement to the Immigration Service. In our view this statement was exculpatory, since it expressed a good faith reason for the failure to apply for travel documents. Under the judge's instructions, the statement was a confession, since good faith was irrelevant and the only question was whether an application had been made.

Even under the trial court's view the conviction can not be sustained. There being no evidence of guilt other than this "confession," the judgment below violates the rule that an uncorroborated confession will not support a conviction in the federal courts. *Isaacs* v. *United States*, 159 U.S. 487; *Opper* v. *United States*, 348 U.S. 84; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160; cf. *Warszower* v. *United States*, 312 U.S. 324; see Annotation, 99 L. ed. 110.

6. The Sentence

The statute here is unique in providing detailed standards for the trial court to determine whether sentence should be suspended. Under the circumstances of this case, these standards, if applied, obviously called for a suspended sentence conditioned on the petitioner's making application for travel documents. The petitioner is aged (first standard); his failure to depart had no effect upon the national security and public peace or safety (second standard), there was no likelihood of his repeating the conduct which made him deportable (third standard), and he had cooperated with the Immigration Service in the procurement of travel documents and was willing to make

further efforts to obtain such documents (fourth standard). The fifth and sixth standards have no applicability to this case in either direction.

The trial court, however, imposed a savage sentence of five years, and reserved the right to add another sentence. He failed to take the statute's suspension provisions into account, and he violated the statute's policy of mercy.

Because of the unique nature of the statute, a substantial question is presented as to whether it is outside the usual rule that sentences may not be reviewed if within statutory limits. We believe that in order to effectuate the statutory policy the Court should review the trial court's failure to suspend the sentence as representing a failure to exercise discretion or an abuse of discretion. This would leave the scope of review short of that applied in contempt cases. *United States* v. *United Mine Workers of America*, 330 U.S. 258.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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